No. 82-1795

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAPITAL CITIES CABLE, INC., ET AL., PETITIONERS

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission has authority over all interstate and foreign communication by wire and radio, including cable television systems, for the purpose of making available "to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. 151, 152(a). The Oklahoma law requiring state cable systems to delete liquor advertisements broadcast by out-of-state television stations has a significant impact upon the regulatory interests of the Commission. The advertising ban, if enforced, will substantially interfere with the ability of cable broadcasters to comply with valid Commission regulations and will impose a serious loss of television service on Oklahoma viewers. In

particular, some cable systems will have to cease carrying out-of-state programming that is required to be carried under the FCC's mandatory signal carriage rules. The court of appeals' decision, moreover, will hinder the provision of television service to rural and other underserved areas in Oklahoma and undermine the federal policy favoring competition and diversity in television programming.

STATEMENT

1. In the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, Congress assigned the FCC the task of regulating the field of broadcasting in the "public convenience, interest, or necessity * * *." 47 U.S.C. 307(a). The Act provides that broadcast licenses must be distributed "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. 307(b). Pursuant to this mandate, the Commission has created a system of locally oriented television broadcasting by carefully allocating broadcast stations to communities throughout the nation and by requiring broadcast licensees to serve those communities. See *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 362 (1955); *Sixth Report & Order in Docket Nos. 8736, et al.*, 41 F.C.C. 148 (1952).

The Commission is authorized to regulate cable television to the extent that such regulation is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *United States* v. *Southwestern Cable*, 392 U.S. 157, 178 (1968) ("Southwestern Cable").[1] This authority has been exercised both for the purpose of protecting the "system of local television broadcasting," *Southwestern Cable*,

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[1]The Communications Act has been held to apply to cable television, even though that technology did not exist at the time of passage of the Act. *United States* v. *Southwestern Cable*, *supra*, 392 U.S. at 167-169; 47 U.S.C. 152(a), 153(a).

supra, 392 U.S. at 177, and in order "to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (plurality opinion).[2] Although state and local governments are free to regulate certain aspects of cable television, the FCC has preempted state regulation in a number of respects, including cable system carriage of broadcast signals. *Report & Order in Docket No. 20272*, 54 F.C.C. 2d 855, 863 (1975); *Clarification of the Cable Television Rules*, 46 F.C.C. 2d 175, 178 (1975).[3]

The Commission has long recognized the important public benefits that cable television provides. For example, cable television "has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception." *Second Report & Order in Docket Nos. 14895, et al.*, 2 F.C.C. 2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). The record in this case, moreover, indicates that

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[2]Although cable systems usually serve an area contained within the borders of a single state, cable communications are deemed interstate in nature even when they consist of broadcast signals emanating from stations in the same state. *Southwestern Cable, supra*, 392 U.S. at 168-169, 172-173.

[3]The Commission has also asserted exclusive jurisdiction over "pay cable, leased channel regulations, technical standards, access, and several aspects of franchise responsibility." *Report & Order in Docket No. 20272, supra*, 54 F.C.C. 2d at 863. State and local authorities in turn may regulate "the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchise selection and conditions of occupancy and construction * * *." *Ibid.* See *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (upholding the preemptive effect on state and local regulation of the Commission's decision not to regulate rates for pay cable television programming).

in some towns in Oklahoma, the only available television signals are those of out-of-state stations imported by cable operators. See Pet. 6.

The Commission has also expressed some concern that the importation of distant television signals by cable could reduce the audiences and therefore the revenues of local television stations, with the possible result that local programming would diminish or the stations themselves cease operations.[4] The Commission, therefore, adopted rules in 1965 that required microwave-served cable systems to carry certain television signals that were available over-the-air (the "must carry" rules), and to delete certain imported network programming that duplicated local programs (the "network nonduplication" rules). *First Report & Order in Docket Nos. 14895, et al.*, 38 F.C.C. 683 (1965), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968). In 1966, the Commission extended these rules to all cable sytems. In addition, it imposed substantial restrictions upon the importation of distant television signals by cable systems (the "distant signal" rules). *Second Report & Order in Docket 14895, et al.*, 2 F.C.C. 2d 725 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (8th Cir. 1968).[5] These rules were designed to guarantee that

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[4]*Cable Television Report & Order (Docket Nos. 18397, et al.)*, 36 F.C.C. 2d 143, 164, 165 (1972), aff'd *sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975); *Second Report & Order in Docket Nos. 14895, et al.*, 2 F.C.C. 2d 725, 781 (1966), aff'd *sub nom. Black Hills Video Corp.* v. *FCC*, 339 F.2d 65 (8th Cir. 1968); *First Report & Order in Docket Nos. 14895, et al.*, 38 F.C.C. 683, 700, 713 (1965). See *Arlington Telecommunications Corp.*, 70 F.C.C. 2d 2291, 2298-2299 (1979), appeal dismissed *sub nom. Committee to Balance the Impact Gaff & Make ARTEC Constitutional*, No. 79-1303 (D.C. Cir. Feb. 5, 1982).

[5]These restrictions were relaxed somewhat in subsequent Commission decisions. For a comprehensive description of the history of the FCC's signal carriage rules, see *Inquiry into the Economic Relationship between Television Broadcasting & Cable Television*, 71 F.C.C. 2d 632, 644-659 (1979).

cable subscribers would continue to receive all available local signals, that the relative competitive positions of the stations in the area would be preserved, and that the system of local broadcasting created by the Commission under Section 307(b) of the Communications Act would not be undermined by undue competition from cable systems. *Second Report & Order in Docket Nos. 14895, et al., supra,* 2 F.C.C. 2d at 735-736; *First Report & Order in Docket Nos. 14895, et al., supra.*

The "must-carry" and "network nonduplication" rules outlined above are still in effect today, although in somewhat modified form.[6] In 1980, however, the Commission re-examined the "distant signal" rules and concluded that these particular rules were no longer necessary to protect the viability of broadcast stations and the sytem of local broadcasting.[7] In addition, the "distant signal" rules were found to restrict competition and diversity in the provision of television programming, to the detriment of the public. *Cable Television Syndicated Program Exclusivity Rules,* 79 F.C.C. 2d 663, 813-814 (1980), aff'd *sub nom. Malrite T.V. v. FCC,* 652 F.2d 1140 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).

The Copyright Act of 1976 establishes a compulsory licensing system for the carriage of television signals by cable systems. Section 101(c)(3) of the Copyright Act, 17

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[6] 47 C.F.R. 76.51-61 (1980) (must-carry); 47 C.F.R. 76.92-99 (network nonduplication). The only other present restriction on cable system signal carriage is the requirement that certain sporting events not be broadcast if the events are not available over-the-air. 47 C.F.R. 76.67.

[7] Even before the repeal of the distant signal rules in 1980, the Commission had relaxed its policy regarding waiver of these rules, in large part because of its belief that the First Amendment would not permit any restriction on cable system signal carriage that was not necessary to protect local broadcasters. *Arlington Telecommunications Corp.,* 70 F.C.C. 2d 2291, 2300 (1979).

U.S.C. (Supp. V) 111(c)(3), requires cable systems, in order to avail themselves of the benefits of the statutory scheme,[8] to carry broadcast signals intact, without deleting any material, including advertisements.[9] This requirement is designed to protect the advertiser, and thus the copyright holder, since the latter's compensation "is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 94 (1976). The statute also protects local broadcasters, by preventing a cable system from inserting advertising without having to bear the same program costs that broadcasters must bear. *Ibid.*

A prohibition against the deletion of advertisements from retransmitted signals is also contained in the Commission's rules. 47 C.F.R. 76.55(b); *Second Report & Order in Docket Nos. 14895, et al., supra,* 2 F.C.C. 2d 725, 756. The FCC rule "is designed to prevent a loss of revenues to local broadcasters sufficient to result in reduced service to the public." *Garland B. Pugh,* 68 F.C.C. 2d 997, 999 (1978).[10]

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[8]Cable operators are permitted under the Copyright Act's "compulsory license" scheme to retransmit any broadcast signal without making individual arrangements with the broadcast licensee. 17 U.S.C. (Supp. V) 111(c). Instead, cable sytems make payments to a royalty pool which is then divided among broadcasters. 17 U.S.C. (Supp. V) 111(d). The compulsory license system was created in order to enable cable systems to carry the signals permitted by the FCC without having to negotiate with every copyright owner whose work the cable operator retransmitted. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

[9]The Act contains a minor exception, not applicable here, for "those engaged in television commercial advertising market research." 17 U.S.C. (Supp. V) 111(c)(3).

[10]At one time, the Commission conducted an inquiry to determine the technical feasibility of permitting cable systems to substitute advertising from local stations in place of the advertisements of distant signals, but rejected the proposal as unworkable. *Cable Television Report & Order (Docket Nos. 18397, et al.), supra,* 36 F.C.C. 2d at 165.

2. The State of Oklahoma prohibits the advertising of alcoholic beverages, even though sale and consumption of alcohol is lawful in Oklahoma.[11] Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, § 516 (West Cum. Supp. 1982-1983); Okla. Const. Art. XXVII, § 5. For a number of years the ban has been enforced against television stations in Oklahoma that retransmit national network programs containing wine advertisements.[12] Notwithstanding the apparent breadth of the advertising ban, the Oklahoma Attorney General has ruled that the law does not apply to out-of-state print media sold in Oklahoma, and until 1980 the law was not enforced against cable television systems retransmitting out-of-state broadcast signals (Pet. App. 4a, 5a, 23a-24a). In March 1980, however, the Attorney General issued an opinion stating that retransmission of wine commercials by cable television systems violated Oklahoma law.[13] Cable operators were thereafter notified that they would be criminally prosecuted if such advertising is carried over their systems (Pet. App. 4a, 41a).

In March 1981, petitioners, several Oklahoma cable systems, filed suit in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief against Richard Crisp, Director of Oklahoma's Alcoholic Beverage Control Board. They argued

[11]Oklahoma law does permit liquor stores to advertise using "strictly regulated on-premises signs" (Pet. App. 3a).

[12]The Oklahoma Supreme Court has found enforcement of the law against television stations to be consistent with the Commerce Clause of the United States Constitution. *Oklahoma Alcoholic Beverage Control Board* v. *Heublein Wines, Int'l*, 566 P.2d 1158 (Okla. 1977).

[13]Op. Okla. Att'y Gen. No. 79-334 (Mar. 19, 1980). Because beer containing less than 3.2% alcohol may be advertised, and because beer may sometimes contain less than 3.2% alcohol, beer commercials need not be deleted (Pet. App. 3a). At the time this case was brought, hard liquor generally was not advertised on television.

that application of the ban to cable carriage of out-of-state broadcast signals violated the Commerce and Supremacy Clauses, their free speech rights under the First and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment. On cross-motions for summary judgment, the district court, after applying the test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980), issued a permanent injunction barring enforcement of the Oklahoma law against petitioners, holding that the ban on liquor advertising was an unconstitutional restriction on the cable operators' First and Fourteenth Amendment right to engage in protected commercial speech. *Cable-Com General, Inc.* v. *Crisp,* No. CIV-81-290-W (W.D. Okla. Feb. 10, 1982) (Pet. App. 33a-50a).[14] The court of appeals reversed, holding that although the advertising at issue here was protected by the First Amendment, the Oklahoma ban was a valid restriction on commercial speech (Pet. App. 20a, 24a).[15]

[14]The district court found that (1) cable systems import broadcast signals that originate outside Oklahoma and contain wine commercials; (2) federal law prohibits cable operators from modifying those signals; (3) cable operators "have no contractual relationship with the stations whose signals they carry, pay no fee to the stations for said signals, and have no voice in the programming carried by such stations;" (4) there is no feasible way for cable operators to delete advertising from imported signals; and (5) inability to carry out-of-state signals containing wine commercials "would probably cause a large but inherently immeasurable reduction in Plaintiffs' subscriber revenue" (Pet. App. 40a-42a).

[15]The court of appeals viewed this Court's summary dismissal of the appeal in *Queensgate Investment Co.* v. *Liquor Control Commission,* No. 81-2174 (Oct. 2, 1982), as controlling the result in the instant proceeding (Pet. App. 24a). In *Queensgate,* the Ohio Supreme Court upheld as consistent with the First and Fourteenth Amendments a partial ban on off-premises advertising of liquor prices by certain liquor permit holders. *Queensgate Investment Co.* v. *Liquor Control Commission,* 69 Ohio 2d 361, 433 N.E. 2d 138 (1982).

DISCUSSION

This case presents an important issue of federal law that warrants this Court's attention: whether, by regulating liquor advertising, a state may effectively ban cable broadcasters from carrying out-of-state programming. Although Oklahoma purports to ban only advertisements, federal copyright laws, FCC rules, and technical factors prohibit the deletion of advertising from broadcast signals transmitted by cable. Accordingly, Oklahoma's ban on liquor advertising will have the effect of preventing Oklahoma cable systems from retransmitting out-of-state broadcast signals to their subscribers, even if those signals originate in nearby states and are required to be carried by applicable FCC regulations. If allowed to stand, the court of appeals' decision will interfere with the FCC's regulatory authority and will diminish the diversity of broadcast voices available in Oklahoma, to the detriment of cable broadcasters and the broad interests of the viewers of Oklahoma.

1. The FCC believes that cable television is a valuable means of furthering the goals of the Communications Act. Among these goals is the provision, "so far as possible, to all the people of the United States [of] a rapid, efficient, Nationwide, and world-wide wire and radio communications service * * *" (47 U.S.C. 151), and the distribution of broadcast services "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). Because Oklahoma's advertising ban prohibits retransmission of *any* signal containing wine commercials, that ban interferes with the "fair, efficient, and equitable distribution" of television broadcast services within the state. 47 U.S.C. 307(b).

The Commission's cable television signal carriage rules are designed to serve the varied interests of broadcasters and television viewers. The rules, for example, assure that

rural areas and areas isolated by terrain can receive, via cable, the signals of stations that, although located nearby, may not provide good reception over-the-air. They also protect local stations against loss of their over-the-air audience. See pages 4-5, *supra*. The Oklahoma advertising ban, however, conflicts with these interests because it forces cable broadcasters to delete all out-of-state service that includes wine advertising —whether or not that service is available over-the-air or is required to be carried under the FCC's "must-carry" rules.[16] Indeed, if the state ban is upheld, approximately one-third of the land area of Oklahoma will lose signals now required to be carried under the FCC's "must-carry" rules (see 47 C.F.R. 76.51-65; *Television Factbook: Stations Volume* (1982-1983 ed.)); certain areas of the state, where over-the-air reception of signals is poor and Oklahoma signals are not available, will receive no television service at all.[17] Such results are inconsistent with the underlying goals of a local broadcasting system —a system that federal cable television regulation is intended not merely to protect but actively to promote. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (plurality opinion).

2. The Oklahoma law also interferes with a cable operator's freedom to select the programming it wishes to provide to its subscribers. This interference raises serious First Amendment concerns, to which the FCC has been sensitive

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[16]Cable systems complying with the ban are forced to delete all out-of-state signals because federal copyright law and FCC rules prohibit the deletion of advertising material from retransmitted signals. See pages 5-6, *supra*. Even if such deletion were lawful, practical difficulties would make it impossible for cable systems to carry distant commercial television signals, virtually all of which on occasion contain commercials for wine (Pet. App. 29a, 41a). See *Cable Television Report & Order (Docket Nos. 18397, et al.)*, *supra*, 36 F.C.C. 2d at 165; note 10, *supra*.

[17]Pet. 6; 2 Court of Appeals Record at 55.

in its own regulation of cable television, and threatens to dampen the diversity of broadcast voices that the Commission has recently endeavored to promote.

The FCC has recognized that restrictions on the signal carriage decisions of cable television operators may "violate the cable operator's First Amendment right to speak or publish." *Arlington Telecommunications Corp.*, 73 F.C.C.2d 766, 773 (1979), appeal dismissed *sub nom. Committee to Balance the Impact Gaff & to Make ARTEC Constitutional* v. *FCC*, No. 79-1303 (D.C. Cir. Feb. 5, 1982); *Tulsa Cable Television*, 74 F.C.C. 2d 382, 385 (1979). See also *Arlington Telecommunications Corp.*, 70 F.C.C. 2d 2291, 2300 (1979). The Commission, therefore, has regulated cable television signal carriage only where such regulation is believed to be necessary to protect local television service, and even then has fashioned its rules in such a way as to impose "the least possible restrictions on First Amendment freedoms * * *." *Tulsa Cable Television, supra*, 74 F.C.C. 2d at 385, citing *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Arlington Telecommunications Corp., supra*, 70 F.C.C. 2d at 2299-2300.[18]

It is in pursuit of these First Amendment interests that the FCC found that its distant signal rules resulted in a substantial loss in competition and diversity. *Cable Television Syndicated Program Exclusivity Rules, supra*, 79 F.C.C. 2d at

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[18]Several circuits have upheld the FCC's distant signal carriage and network nonduplication rules as consistent with the First Amendment. *E.g., Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 242 (9th Cir. 1969) (nonduplication); *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 67 (8th Cir. 1968) (must-carry, distant signal, and nonduplication); *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1189-1190 (3d Cir. 1968) (nonduplication); *Buckeye Cablevision, Inc.* v. *FCC*, 387 F.2d 220, 225-226 (D.C. Cir. 1967) (distant signal). This Court has never passed upon the validity of the distant signal rules under the First Amendment.

813-814. See *Malrite TV* v. *FCC*, 652 F.2d 1140, 1151 (2d Cir. 1981). "[It] has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' " *First Report & Order (CATV), Docket No. 18397*, 20 F.C.C. 2d 201, 205 (1969), aff'd *sub nom. United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (other citations omitted).[19]

Although ostensibly aimed at limiting the consumption of alcohol, the advertising prohibition at issue here has a significantly broader impact.[20] Whatever its influence on

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[19]In Docket No. 18397 the Commission promulgated rules requiring cable systems to originate programming and to maintain facilities for local production. This Court upheld the Commission's authority under the Communications Act to adopt the rules. *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). In the plurality opinion, the Court cited the Commission's recognition of "the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." *Id.* at 654, quoting *First Report & Order in Docket No. 18397, supra*, 20 F.C.C. 2d at 202. The Commission later deleted the mandatory origination rule, finding that in view of the costs imposed on cable systems, origination should be voluntary. *Report & Order in Docket No. 19988*, 49 F.C.C. 2d 1090, 1104-1106 (1974). The equipment availability rule was part of a package of cable access channel rules that this Court invalidated in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). There, the Court found that Section 3(h) of the Communications Act, 47 U.S.C. 153(h), precluded the FCC from treating cable operators as common carriers. 440 U.S. at 708-709.

[20]This factor alone serves to distinguish this case from *Queensgate Investment Co.* v. *Liquor Control Board, supra*, so heavily relied upon by the court of appeals (Pet. App. 7a-9a, 13a-14a). The regulation in that case, as the court of appeals recognized, affected only the commercial speech of "liquor permit holders" (Pet. App. 14a). Here, by contrast, the advertising ban broadly restricts the dissemination of noncommercial speech by cable broadcasters.

liquor sales, the state ban on liquor advertising has the inevitable effect of banning the carriage of out-of-state broadcast signals by Oklahoma cable operators. Such a result limits the ranges of broadcast voices available in the state and thus undermines the national policy favoring the dissemination of information from varied and diverse sources.[21]

3. For the reasons stated above, the Commission believes that the decision of the court below was erroneous. If the decision is allowed to stand, certain cable broadcasters in Oklahoma will be faced with the choice of complying with state law or applicable FCC signal carriage rules; compliance with both will, in some circumstances, be impossible. The cable broadcaster cannot simply delete the offending advertisements because of the proscriptions of applicable FCC regulations and federal copyright law, nor can it simply discontinue the out-of-state signal in all instances because of the Commission's "must-carry" rules. The decision, as even the court below recognized, places cable broadcasters "in a difficult position" (Pet. App. 23a). More important, the decision below substantially interferes with the existing federal regulatory framework established to promote cable broadcasting.

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[21]Oklahoma cable subscribers, for example, will be deprived of the programming of distant out-of-state stations, including cable "superstations" whose programming has wide national appeal. Further, because carriage of out-of-state broadcast signals is what attracts many subscribers to cable, cable systems are likely to lose substantial revenues as a result of the ban (Pet. App. 42a). If cable systems cease operations, the public will be denied access not just to retransmitted television signals but also to other cable services, including special news, motion picture, and sports cable channels. *E.g.*, Cable News Network, Home Box Office, and the Entertainment and Sports Programming Network. The Oklahoma ban against wine commercials, therefore, threatens to result in a substantial loss in program availability and diversity for residents of Oklahoma.

We believe that this case warrants the attention of this Court. The questions presented by petitioners, however, focus exclusively on First Amendment concerns. Should the Court grant the petition in this case, it may wish to consider directing the parties to brief and argue the question whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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